(1) Supreme Court, U.S.
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No.

In the

# Supreme Court of the United States

OFFICE OF COMMUNICATION, INC.,
UNITED CHURCH OF CHRIST,
*Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION
& THE UNITED STATES OF AMERICA

and

MARYLAND/DISTRICT OF COLUMBIA/
DELAWARE BROADCASTERS ASSOCIATION, *et. al.,*
*Respondents.*

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

## PETITION FOR WRIT OF CERTIORARI

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## Questions Presented For Review

I. In a facial challenge to the Federal Communications Commission's broadcast equal employment opportunity regulation that required licensees to conduct broad outreach and recruitment for every job vacancy and for licensees choosing one of two programs to collect data on the race, ethnicity and gender of applicants, did the lower court err by striking down the regulation in its entirety on equal protection grounds where the regulation had valid applications and where by its terms and by the agency representation, the regulation did not require licensees to target any racial or ethnic group in recruiting.

II. By an interpretation of the Federal Communications Commission's broadcast equal employment opportunity regulation that raised a constitutional question on which ground the regulation was declared invalid, did the lower court err where on its face and by the agency interpretation, the regulation was susceptible of an alternative construction.

## Corporate Disclosure Statement

Petitioner, Office of Communication, Inc., United Church of Christ, is a not-for-profit, eleemosynary corporation, which was incorporated by the national chapter of the United Church of Christ, an association of churches of the same denomination. Neither of these entities issue stock and therefore neither has a parent corporation or stockholders.

## Parties to the Proceeding

1. Federal Communications Commission, respondent.
2. The United States of America, respondent.
3. Office of Communication, Inc., United Church of Christ, petitioner.
4. MD/DC/DE Broadcasters Associations, *et. al.*, petitioners for review below. With the exception of the Georgia Association of Broadcasters, these parties are non-profit, incorporated trade associations comprised of broadcast station members. The Georgia Association of Broadcasters is an incorporated, for-profit trade association. None of the State Associations has issued any share or debt securities to the public. No parent company or publicly-held company has an ownership interest in any of the State Associations. The trade associations are: Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters Association, Arkansas Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Georgia Association of Broadcasters, Hawaii Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of

Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Jersey Broadcasters Association, New Mexico Broadcasters Association, New York State Broadcasters Association, Inc., North Carolina Association of Broadcasters, North Dakota Broadcasters Association, Ohio Association of Broadcasters, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, Radio Broadcasters Associations of Puerto Rico, Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Virginia Association of Broadcasters, Washington State Association of Broadcasters, West Virginia Broadcasters Association, Wisconsin Broadcasters Association, and Wyoming Association of Broadcasters.

5. MMTC, *et.al.*, intervenors below, are each non-profit organizations and are composed of individual members, with the exception of the African American Media Incubator, which is a non-profit educational institution that also serves as a civil rights advocacy organization. Each organization is either a trade association or a professional association. None of the organizations, or any of their parents, subsidiaries, or affiliates has issued any shares or debt securities to the public. The

organizations are: Minority Media and Telecommunications Council, African American Media Incubator, Alliance for Community Media, Alliance for Public Technology, Civil Rights Forum on Communications Policy, Cultural Environment Movement, Fairness and Accuracy in Reporting, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, National Asian Pacific American Legal Consortium. National Association of Black Owned Broadcasters, National Association of Black Telecommunications Professionals, National Association for the Advancement of Color People, National Association of Black Journalists, National Bar Association, National Council of La Raza, National Hispanic Foundation for the Arts, National Hispanic Medial Coalition, including its Los Angeles, New York, Chicago, Tucson, Albuquerque, Phoenix and San Antonio Chapters, National Latino Telecommunications Taskforce, National Urban League, People for the American Way, Project on Media Ownership, Puerto Rican Legal Defense and Education Fund, Rain/PUSH Coalition, Telecommunications Advocacy Project, Telecommunications Research and Action Center, and Women's Institute for Freedom of the Press.

6. National Organization for Women, *et. al.*, intervenors below, include the following organizations: National Organization for Women, a feminist organization, with a membership consisting of men and women; the Center for Media Education, a national non-profit organization; the Feminist Majority Foundation; the Philadelphia Lesbian and Gay Task Force, a civil and human rights advocacy organization; and Wider Opportunities for Women, a national women's employment organization. None of these organizations have parent companies, subsidiaries, or affiliates which have issued shares or debt securities to the public.

7. Amici Curiae below: American Federation of Television and Radio Artists; National Cable Television Association; NAMIC, Inc. and Women in Cable & Telecommunications, Inc.; Leadership Conference on Civil Rights; Congressional Black Caucus; National Council of the Churches of Christ in the USA; and Radio One, Inc., El Dorado Communications, Inc., Granite Broadcasting Corporation, Z-Spanish Media Corporation, Hispanic Broadcasting Corporation, Telemundo Group, Inc., Blue Chip Broadcasting, Inc., Brunson Communications, Inc., Stop 26-Riverbend, Inc., Rainbow Radio, L.L.C., and Entravision Communications, L.L.C.

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*MD/DC/DE Broadcasters Ass'n, et. al., v. FCC*, 236 F.3d 13, *reh'g & reh'g en banc denied*, 253 F.3d 732 (D.C. Cir. 2001).

## Statement of Jurisdiction

1. The original judgment in this case was entered on January 16, 2001.

2. The order denying rehearing and rehearing en banc was entered on June 19, 2001.

3. The statutory provision conferring on this Court jurisdiction to review on writ of certiorari the judgment or order in question is 28 U.S.C. § 1254(1).

## Constitutional Provisions, Statutes, and Regulations Involved in the Case

1. The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> No person shall ... be deprived of life, liberty, or property without due process of law.... U.S. CONST. amend. V.

2. The Communications Act of 1934, as amended, 47 U.S.C.. § 151 (1994 ed. and Supp. V), provides in pertinent part:

> For purposes of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without

> discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nationwide, and worldwide wire and radio communication service ... there is created a commission to be known as the 'Federal Communications Commission....

3. The Communications Act of 1934, as amended, 47 U.S.C.. § 307(a)(1994 ed.), provides:

> The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

5. Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C.§ 334 (1994 ed.).

6. Cable Communications Policy Act of 1984, 47 U.S.C. §554(1994 ed.).

7. Broadcast EEO Rule, 47 C.F.R. §73.2080 (2000).

Pursuant to this Court's Rule 14.1(f), the full text of the Cable Television Consumer Protection and Competition Act of 1992, the Cable Communications Policy Act of 1984, and the regulation involved in this case are set forth in the Joint Appendix ("Joint App."), accompanying the Petition for Writ of Certiorari by Minority Media Telecommunications Council, *et. al.*

## STATEMENT OF THE CASE

This case concerns a ruling by the lower court that declared invalid on equal protection grounds, the broadcast equal employment opportunity rule (the "EEO rule" or "rule") newly adopted by the Federal Communications Commission ("Commission"). *See In the Matter of Review of the Commission's Broadcast & Cable Equal Employment Opportunity Rule and Policies and Termination of the EEO Streamlining Proceeding, Report & Order*, 15 FCC Rcd 2329 (2000)("*R & O*"), Joint App. at 47a.. Though the rule was recently adopted, it was not the Commission's first word or effort on the subject. It was a restatement of more than thirty years of similar rules that both prohibited discriminatory hiring practices by broadcast licensees and established a policy to eliminate recruitment practices that operated to exclude job applicants on the basis of race, ethnicity or gender.

Under Section 151 of the Communications Act of 1934, as amended, 47 U.S.C. § 151, *et. seq.*, (1994 ed. and Supp. V) (the "Act"), the Commission is charged broadly with making available wire communications services without discrimination on the basis of race, color, religion, national origin, or sex. 47 U.S.C. § 151. Section 307(a) authorizes the Commission to grant a license to operate a broadcast station only when "the public convenience, interest or necessity will be served...." 47 U.S.C. § 307(a) (1994 ed.).[1]

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[1]Also, section 309(j), added in 1997, requires the Commission, in designing rules for awarding licenses by competitive bidding, to "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by ... disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women...." 47 U.S.C.A. § 309(j)(3)(B)(1994 ed. and

Up until the first formal rule was adopted in 1969,[2] the Commission's policy was to act upon individual complaints of discrimination and it did so on the basis that it was contrary to the "public interest, convenience or necessity" to grant or renew licenses to persons who engaged in racial discrimination.[3] That interpretation of the statute was approved by the Court in *N.A.A.C.P. v. F.P.C.*, 425 U.S. 662, 665, 670, n. 7 (1976)(elimination of discrimination from society is an important national goal and Congress could authorize regulatory agencies to act to combat it through regulations). *See also Bilingual Bicultural Coaltition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 628-29 (D.C. Cir. 1978)(*en banc*)(Commission required to investigate licensees' employment practices and, in assessing their character qualifications, consider whether they had engaged in intentional employment discrimination).

When it adopted the formal rule, the Commission determined that the complaint-oriented enforcement policy did not work, and in light of three decades of experience, was not expected to work.[4] The Commission had come to recognize that forces other than overt discriminatory practices worked against equal employment opportunity for racial and ethnic minorities. To a greater degree, the Commission found, the

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Supp. V); *see also* 47 U.S.C. § 309(a)(1994 ed.)(applications for licenses granted in the "public interest, convenience and necessity"); 47 U.S.C. § 309(k)(1994 ed. and Supp. V)(renewal applications granted in "public interest, convenience and necessity").

[2] *In the Matter of Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 18 F.C.C.2d 240, 242-43 (1969).

[3] *In the Matter of Petition for Rulemaking to Require Licensees to Show Nondiscrimination in Their Employment Practices*, 13 FCC2d 766, 770 (1968).

[4] 18 F.C.C.2d at 243.

indifference of employers hindered qualified applicants and employees from being hired and promoted on the basis of equality, and employment sources did not normally supply job applicants regardless of race, color, religion or national origin, unless asked to do so by employers.[5] The formal rule thus required licensees to "establish, maintain, and carry out, a positive continuing program of specific practices designed to assure equal opportunity in every aspect of station employment policy and practice."[6] Subsequent amendments required licensees to develop and implement EEO programs in accordance with specific guidelines that required, among other things, the recruitment of minorities through employment advertisements in media with significant circulation among minority groups, the placement of notices at schools and colleges with significant minority-group enrollment, and contacts with minority and human relations organizations for referrals of applicants. Licensees were also to encourage present employees to refer minority applicants and to make known to all recruitment sources that qualified minority members were being sought for consideration whenever the station hired.[7]

In the years following, the Commission evaluated the efficacy of the rule and policies on several occasions. In a 1974 inquiry, it determined that employer neutrality was still as great a barrier to equal employment opportunity for women and

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[5] *Id.*

[6] *Id.* at Appendix A.

[7] *In re Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 23 FCC 2d 430, 431, 436-37 (1970). In 1971, the rules were amended to include women within their coverage. *In the Matter of Amendment of Part VI of FCC Forms 301, 311, 314, 340, and 342*, 32 FCC 2d 708 (1971.

minorities as intentional discrimination.[8] In a 1975 inquiry, the Commission found that the general EEO guidelines did not adequately describe and exemplify the measures that licensees should undertake in their EEO efforts. In 1976, the Commission adopted a model EEO program, which in large measure incorporated the recruitment initiatives laid out in the previous guidelines.[9]

In subsequent amendments to the Act, Congress codified the then existing EEO rules and gave the Commission expanded rulemaking authority to ensure equal employment opportunity. Section 554(c) was added in 1984[10] and granted the Commission broad authority to adopt rules banning employment discrimination by cable operators and requiring them to "establish, maintain, and execute a positive continuing program of specific practices designed to ensure equal employment opportunity in every aspect of [their] employment policies and

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[8] *Inquiry Into the Employment Policies and Practices of Certain Broadcast Stations Located in Florida*, 44 FCC 2d 735, 737-38 (1974).

[9] *In the Matter of Non-Discrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 FCC 2d 226, 228 (1976).

[10] Cable Communications Policy Act of 1984, Pub.L. No. 98-549, §2, 98 Stat. 2779, 2797 (1984), adding Section 554. Joint App. at 262a-268a. The House report accompanying this act stated that the amendments were intended to "codif[y] and strengthen[] the Commission's then existing equal employment opportunity regulations." H.R. Rep. No. 934, 98th Cong., 2d Sess. 86 (1984), reprinted in [1984] U.S. Cong. News 4655. The House Report noted that "while the employment record of the cable industry ha[d] improved in the years since the Commission first adopted equal employment opportunity regulations, women and minorities were still significantly underrepresented as employees and owners in the industry." *Id.* at 4723. The report stated further that "the committee strongly believe[d] that equal employment requirements [were] particularly important in the mass media area where employment is a critical means of assuring the program service will be responsive to a public consisting of a diverse array of population groups." *Id.*

practices."[11]

A 1992 amendment, Section 334(a), provided that "the Commission shall not revise" either the "regulations concerning equal employment opportunity regulations as in effect on September 1, 1992 ... as such regulations apply to television broadcast station licensees and permittees", or "the forms used by such licensees and permittees to report pertinent employment data to the Commission."[12] In this amendment, Congress found and declared that despite the EEO rules "females and minorities [were] not employed in significant numbers in positions of management authority in the cable and broadcast industries;" that "increased numbers of females and minorities in [such] positions ... advances the Nation's policy favoring diversity in the expression of views in the electronic media;" and that "rigorous enforcement of [EEO] rules [was] required ... to effectively deter racial and gender discrimination."[13]

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[11] In 1985, pursuant to this amendment, the Commission adopted rules for cable operators. *In re Amendment of Part 76 of the Commission's Rules to Implement the Equal Employment Opportunity Provisions of the Cable Communications Policy Act of 1984*, 102 FCC 2d 562 (1985).

[12] This section was added by Section 634 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). Joint App. at 269a-273a. The conference report accompanying this legislation stated that Section 634 "codifie[d] the Commission's equal employment opportunity rules ... for television licensees and permittees. Conf. Rep. No. 862, 102 Cong., 2d Sess. 97 (1992).

[13] 106 Stat. at 1498, Joint App. at 269a-270a. This Act also amended Section 554. Subparagraph § 554(d)(3) required the collection of more specific employee data for certain cable job categories and required licensees to prepare reports for the evaluation of their recruitment efforts. In addition, it required the Commission to "prescribe revisions on the rules under this section in order to implement the amendments made to this section by such Act." 47 U.S.C. 554(d)(3)(A), (B)(1994 ed. and Supp. V), Joint App. at 270a-272. In 1993, the Commission adopted new rules for

Beginning in 1987, the Commission's evaluation of a licensees's compliance with EEO program requirements focused on the licensee's overall efforts.[14] If after a review of information on hand, such as the station's EEO program filed as part of the renewal application, any final determinations of discrimination by other government agencies, and the station's annual employment report, the Commission determined the licensee's EEO efforts to be unsatisfactory, it usually would request additional information, such as the number, sex, race or national origin and referral source of applicants and interviewees; the recruitment sources contacted; the number, race and sex of referrals received from the recruitment sources; and whether the station notified sources of minority and female referrals when vacancies occurred.[15] If the licensee was not in compliance, the Commission might order a remedy or sanction, including admonishment, reporting conditions, short-term renewal and/or monetary forfeiture. In cases of substantial noncompliance, the Commission might designate a renewal application for hearing to determine whether it should be granted or denied.[16]

When it amended Section 554 in 1992, Congress

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cable operators as directed by this section. *In the Matter of Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 1992, Equal Employment Opportunities*, 8 FCC Rcd 5389, 5394 (1993).

[14]*Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987). Prior to that time, the Commission evaluated compliance by particular reference to processing guidelines that looked to the employment of women and minorities overall and in upper level jobs relative to the labor force. *Id.*

[15]*Id.* at 3974.

[16]*In the Matter of Implementation of Commission's Equal Employment Opportunity Rules*, 9 FCC Rcd 6276, 6292 (1994).

ordered the Commission within two years to report on the effect and operation of the new provisions. In its report to Congress, the Commission stated that the rules and policies had been effective in promoting equal employment opportunity in the broadcast and cable industries, that during the particular period evaluated for the report (1986 and 1993), there had been a recognizable increase in the employment of women and minorities overall and in total upper level positions.[17] The Commission also reported that its efforts-based policy for evaluating licensee compliance was largely effective. Approximately 96% of the broadcast renewal applications were renewed without reporting conditions and/or sanctions, and over 90% of cable units were certified each year.[18] But because the levels of employment of minorities and women in the industry were still relatively low and because there was evidence of many instances in which licensees did not recruit at all in filling positions, the Commission concluded that the rule and policies were still necessary.[19]

The rule in effect just prior to the rule here was declared invalid in part by the lower court in *Lutheran Church-Missouri Synod v.* FCC, 141 F.3d 344 (D.C. Cir. 1998), *pet. for reh'g denied,* 154 F.3d 487, *pet. for reh'g en banc denied,* 154 F.3d 494 (D.C. Cir. 1998)("*Lutheran Church*"). The court ruled that the provisions of the prior rule that required a comparison of a station's employment profile with the relevant labor force as part of the initial analysis of a station's EEO program, was invalid because they "pressured stations to maintain a work force that mirrored the racial breakdown of their metropolitan

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[17] *Id.* at 6279, 6294.
[18] *Id.* at 6314-15.
[19] *Id.*

statistical area" and thus set up a racial classification subject to strict scrutiny. 141 F.3d at 352. The court held that the rule was not narrowly tailored insofar as it applied to all station employees in the absence of evidence linking low-level employees to programming content, where one of the asserted grounds for the rule was diversity in programming. *Id.* at 356. The court did not evaluate the constitutionality of the rule as applied to women since that issue was not before it. It also did not reach the question of the Commission's authority to adopt an anti-discrimination rule and remanded the case to the Commission. *Id.* at 356.

In adopting the rule at issue, the Commission determined that it held the statutory authority to regulate the employment practices of broadcast licensees through regulations. *R & O* at ¶¶ 17-62, Joint App. at 571-99a. The Commission reiterated that a rule and policies that required licensees not merely to refrain from intentional discrimination, but also to "reach out in recruiting new employees beyond the confines of their circle of business and social contacts to all sections of their communities," was necessary to counteract the discriminatory effects of the "repeated hiring without broad outreach on minorities and women job candidates when they are poorly represented in an employer's staff -- particularly ... in the ranks of management employees who make hiring decisions." *R & O* at ¶3, Joint App. at 50a. The Commission explained that "it is not enough to say that one will not discriminate against anyone who applies for a job when not all have been given a fair opportunity to apply." *Id.* Rather, ["o]utreach in recruitment must be coupled with a ban on discrimination to effectively deter discrimination and ensure that a homogenous workforce does not simply replicate itself through an insular recruitment and

hiring process." *Id.*[20]

**The Specific Requirements of the Rule**

As general and overarching obligations, licensees were required to refrain from discrimination on the basis of race, color, religion, national origin, or sex, and to establish and carry out equal employment opportunity programs. 47 C.F.R.§ 2080(a), (b), Joint App. at 35a. They were also to recruit for every job vacancy and widely disseminate information about job openings to ensure that all qualified applicants were able to compete without discrimination. *Id.* As an additional specific requirement, licensees were required to engage in a supplemental recruitment measure, either the one whose terms were described in the rule (Option A) or one designed by the licensee (Option B). 47 C.F.R.§ 2080(c), (d), Joint App. at 35a-42a.

Under Option A, licensees were required to give notice of job openings to qualifying organizations that requested such notice and engage in two or four (depending on the size of the licensee) of certain longer-term recruitment initiatives selected from a menu contained in the rule. The menu's thirteen items included such activities as attending job fairs, working with job banks and participating in programs sponsored by educational institutions. Only two items made reference to activities involving groups or individuals defined in whole or in part, by race, ethnicity or gender -- co-sponsoring at least one job fair with, or listing each upper level job opening in a job bank or

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[20]In the *Lutheran Church* opinion denying rehearing, the court stated that "[a] regulation encouraging broad outreach to, as opposed to the actual hiring of, a particular race would [not] necessarily trigger strict scrutiny". 154 F.3d at 492.

newsletter of, organizations whose membership includes the substantial participation of women and minorities. 47 C.F.R. § 2080(c)(2)(iii), (xii), Joint App. at 37a-38a. But because no more than four items needed to be selected during any two-year period, a licensee needed never to select either of these two items. And, licensees choosing Option A were not required to maintain data on the race, ethnicity or gender of either applicants or interviewees.

Under Option B, a licensee could design its own "broad and inclusive outreach program", but had to "demonstrate that it [was] widely disseminating information concerning job vacancies by analyzing the recruitment sources, the race, ethnicity and gender of the applicants attracted by its recruitment efforts." *R & O* at ¶¶ 78, 104, Joint App. at 112a, 129-30a.

**The Lower Court Ruling**

Maryland/District of Columbia/Delaware Broadcasters Associations, *et. al.* ("Broadcasters"), a group of trade associations, challenged the rule on its face on equal protection and statutory grounds, arguing, *inter alia*, that the rule pressured licensees to recruit and hire on the basis of race. Petitioner herein, Office of Communication, Inc., United Church of Christ, ("UCC"), also challenged the rule, arguing, *inter alia*, that the Commission acted arbitrarily and capriciously when failed to include in the new rule a requirement that licensees make specific efforts to reach minorities and women in their recruiting, as did the prior rule, and that the absence of such a requirement worked to undermine the stated regulatory objectives. Intervenors, Minority Media Telecommunications Council, *et. al.*, and the National Organization for Women, *et. al.*, intervened in support of the rule. Several amici curiae also

filed briefs in support of the rule.

The lower court exercised jurisdiction over the challengers' petitions for review pursuant to 47 U.S.C. § 402(a)(1994) and 28 U.S.C. § 2342 (1994). A panel of the lower court held the rule unconstitutional in part. *MD/DC/DE Broadcasters Ass'n, et. al., v. FCC*, 236 F.3d 13, 19, 20, *reh'g & reh'g en banc denied*, 253 F.3d 732 (D.C. Cir. 2001), Joint App. at 1a, 19a.

Option A was upheld because under it, a licensee was free "to select recruitment measures that did not place special emphasis on the presence of women and minorities in the target audience." 236 F.3d at 18-19, Joint App. at 1a, 19a. As such, the panel did "not believe that Broadcasters [were] meaningfully pressured... to recruit women and minorities." *Id.*

Option B was declared unconstitutional on the ground that the requirement to collect data on the race and ethnicity of applicants would pressure licensees to recruit on the same basis. The panel reasoned that because under the rule, "the Commission promises to investigate any licensee that reports 'few or no' applications from women or minorities" and that because "[i]nvestigation by the licensing authority is a powerful threat, almost guaranteed to induce the desired conduct," *(Id.* at 19, Joint App. at 10a, 13a), the rule "compelled broadcasters to redirect their necessarily finite recruiting resources so as to generate a larger percentage of applications from minority candidates."*Id.* at 20-21, Joint App. at 13a -14a. And, "[a]s a result, some prospective nonminority applicants who would have learned of job opportunities but for the Commission's directive now will be deprived of an opportunity to compete simply because of their race." *Id.* This in the panel's view established a racial classification subject to strict scrutiny, which

the rule did not survive. *Id.* at 22, Joint App. at 16a.

While the panel did not find the rule unconstitutional as to Option A, or as it applied to women, it refused to sever those parts of the rule from Option B. The panel dismissed UCC's petition as moot. *Id.* at 19, 22-23, Joint App. at 17a-18a.

The Commission, UCC and intervenors filed petitions for rehearing and for rehearing *en banc*. Those petitions were denied by a vote of five to three, with Judges Tatel, Edwards and Rogers voting in favor of rehearing *en banc*. *MD/DC/DE Broadcasters Ass'n, et. al., v. FCC*, 253 F.3d 732 (D.C. Cir. 2001), Joint App. at 19a. Judge Tatel filed a dissenting opinion in which Judges Edwards and Rogers joined. In the dissenting opinion, Judge Tatel pointed out that Broadcasters' facial challenge should have failed under the standards enunciated by the Court because they had not shown that under no circumstances the regulation would be valid. *Id.* at 736, *citing United States v. Salerno*, 481 U.S. 731, 745 (1987), Joint App. at 26a. To the dissenting judges, the rule on its face required no more than "outreach to the entire community", which did not require or pressure licensees to reduce their recruitment efforts as to white males. 253 F.3d at 737, Joint App. at 26a. Judge Tatel went on to show that the panel's finding that the rule pressured licensees to make recruiting efforts on the basis of race because of the threat of an investigation, was contradicted by the record, that "[t]he Commission never 'promised' to investigate licensees that report few or no applications from women or minorities." *Id.* at 738-39, Joint App. at 27a-28a, 30a. In Judge Tatel's view, there was only speculation by the panel about the rule's effects and "speculation that some broadcasters, imagining pressure from the Commission or misreading the agency's intentions, might go beyond what Option B requires is no reason to declare it facially

unconstitutional." *Id.* at 739, Joint App. at 30a.

Judge Tatel showed that Option B also did not exert pressure on licensees to recruit on the basis of race because, as one of two options, a licensee could avoid the data collection requirements and hence any pressure, by electing Option A. *Id.* at 738, Joint App. at 28a.

## REASONS FOR GRANTING THE WRIT

The lower court ruling nullified more than three decades of rules and policies that were required both by the exigencies of the public interest and Congress to ensure that access to the nation's radio spectrum services is available to all without discrimination. In this respect, the ruling has negated the Commission's specific statutory power and duty to employ preventive measures against discriminatory practices. The ruling is especially disabling because industry-wide problems such as inequality of opportunity are not effectively addressed by case by case adjudication alone.

The ruling also leaves the Commission powerless to adopt regulations or enforcement policies of any sort, however firmly based on its own fact-finding and experience, to the extent that it can be pre-empted by a court finding its regulations unconstitutional on the basis of theoretical applications alone.

The lower court ruling also produces the incongruous result that whether similar measures for ensuring equal employment opportunity adopted by other agencies are held valid will depend on the circuit in which a challenge is brought, since every other circuit court that has considered the issue has upheld broad outreach and recruitment as race-neutral.

Review by this Court is therefore necessary to forestall these grave effects which, as we point out, are all based in the

lower court's substantial departure from the Court's standards for evaluating facial challenges to the constitutionality of a regulation, those on deference to an agency's interpretation of its own rules and those on constitutional avoidance. These points of error are discussed in turn.

## I. Review is Warranted Because the Lower Court's Ruling Conflicts With the Standards Established by the Court for Evaluating Facial Challenges

The lower court held that the rule was invalid on its face on the ground that part of it might be applied in an unconstitutional manner. In so ruling, the lower court ignored the considerable import of the posture of the litigation, that it was a facial challenge. Like facial challenges in general, this was a claim that the rule was invalid in all of its applications. Such broad claims have warranted pause by the Court. *See Babbitt v. Sweet Home Chapter of Oregon, Etc.*, 515 U.S. 687, 699-700 (1995)(Stevens, J.)(challenging a regulation defining harm to endangered species to include habitat modification, petitioners "ask us to invalidate the Secretary's understanding of 'harm' in every circumstance, even when an actor knows that an activity, such as draining a pond, would actually result in the extinction of a listed species by destroying its habitat"). Indeed, "[t]he Court has historically been reluctant to entertain facial attacks on statutes, ... [t]he normal approach [being] ... to determine whether a law is unconstitutional as applied in the particular case..." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 774-75 (1988)(White, J., dissenting); *Brokert v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-03 (1985); *United States v. Raines*, 362 U.S. 17, 20-24 (1960). The reasons for this reluctance are both prudential and practical. "Confining the Court's attention to the actual impact of a law on the complaining party is a policy of restraint that rests upon the

time-tested advisability of having concrete, rather than hypothetical cases before it", and the Court "can arrive at informed judgments only when [it has] a record showing the actual impact of the challenged statute." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. at 776, n.4 (White, J., dissenting); *see also United States v. Raines*, 362 U.S. at 21.

Under this wisdom, a challenger "faces a heavy burden in seeking to have [a] regulation invalidated as facially unconstitutional." *Rust v. Sullivan*, 500 U.S. 173, 183 (1990); *see also Kraft Gen. Foods, Inc. v. Iowa Dep't of Rev. and Fin.*, 505 U.S. 71, 82 (1992)(Rehnquist, C.J., dissenting). It is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. at 745. While there appears some difference of view within the Court as to whether, despite this language in *Salerno*, to defeat a facial challenge, it is sufficient to point to one valid application of a statute, *Reno v. Flores*, 507 U.S. 292, 301 (1993)(quoting *Salerno)*; *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990)(quoting *Salerno*); *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 589, 593 (1986)(the agency need "merely to identify a possible set of permit conditions not in conflict with federal law"), there does not appear to be any disagreement that "the fact that the [regulation] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [it] wholly invalid." *Salerno*, 481 U.S. at 745; *see also Janklow v. Planned Parenthood*, 517 U.S. 1174, 1175-76, 1175, n.1 (1996)(Stevens, J., concurring in denial of certiorari and expressing the view that this, rather than the "no circumstances" language in *Salerno* characterizes the standard actually applied by the Court); *Babbitt v. Sweet Home Chapter of Communities*

*for a Greater Oregon, Etc.*, 515 U.S. at 714 (O'Connor, J., concurring)(although possible to identify "at least one application of the regulation ... that [was] inconsistent with the regulation's *own* limitations," (emphasis in original), "[t]hat misapplication d[id] not...call into question the validity of the regulation itself"...where it "ha[d] innumerable valid...applications."); *Kraft Gen. Foods, Inc. v. Iowa Dep't of Rev. and Fin.*, 505 U.S. at 82 (1992)(Rehnquist, C.J., dissenting) (quoting second part of *Salerno* test); *Rust v. Sullivan*, 500 U.S. at 183(facial challenge fails when "on [its] face, the regulations are both authorized by the Act and can be applied to a set of individuals without infringing upon constitutionally protected rights"); *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 188 (1991)(that the regulation may be invalid as applied in certain cases does not mean that the regulation is facially invalid).

In no case, the Court has said, is it proper to "invalidate... [a]... statute based on a worst-case analysis that may never occur" or on "the mere possibility" of a violation of rights by the statute's operation." *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. at 513-14 (lower court erred by envisioning the improper disclosure of confidential data and by supposing delay by interpreting "days" to mean business and not calendar days); *see also Public Lands Council, et. al. v. Babbitt*, 529 U.S. 728, 750 (2000) (O'Connor, J., concurring) ("Petitioners ha[d] not shown how the new regulations themselves -- rather than specific actions the Secretary might take pursuant to those regulations -- violated the [statute's] requirement[s]); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998)("'We will not now pass upon the constitutionality of these regulations by envisioning the most extreme application conceivable, but will deal with those

problems if and when they arise.'"); *Reno v. Flores*, 507 U.S. 292, 310 (1993)("...we will not assume, on this facial challenge, that an excessive delay will invariably ensue").

### A. The Lower Court Invalidated the Rule on the Basis of a Worst-Case Analysis that May Never Occur

There was no analysis by the lower court other than of the worst-case. That case began with a conclusion that the Commission would conduct an "investigatory hearing" on all licensees whose applicant pools showed few or no minorities, and that licensees, fearful of such a hearing, would engage in targeted recruitment and hiring, thereby "redirecting their necessarily finite resources" to the detriment of white males. *MD/DC/DE Broadcasters Ass'n*, 236 F.3d at 19-20, Joint App. at 10a, 13a, 14a. However, none of these conclusions had any support in the record. Neither the text of the rule, nor the *R & O* spoke of an investigatory hearing like that in the scenario drawn by the panel.[21] What the Commission did say was that

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[21]It also appeared that the drastic investigatory proceeding the lower court had in mind was a license renewal hearing (at least that is what the author of the text cited by the lower court described), far different in objective and scope than an EEO investigation. Even under the prior and more demanding rule, EEO investigations usually entailed a request for additional information from the licensee and a review of the licensee's response to the inquiry, along with other relevant pleadings to determine if the broadcaster had engaged in adequate outreach. *See* discussion, *supra* at 6-7. A license renewal hearing, in contrast, is a rare and complex proceeding and undertaken only when there are substantive and material questions of fact concerning the broadcasters' qualifications to retain its license. 47 U.S.C § 309(e)(1994 ed.). In *Bilingual Bicultural Coalition on the Mass Media v. FCC*, 595 F.2d at 628 , the lower court explained that because the Commission's policies are prospective, it rarely designated license renewal applications for hearings solely to investigate substandard affirmative action performance. However, in implementing its anti-discrimination policy, of necessity, the Commission was required to

"few or no females or minorities in a broadcaster's applicant pool may be one indication (and only one indication) that the station's outreach efforts are not reaching the entire community." *R & O* at ¶ 120, Joint App. at 138a; *see also* ¶¶ 104, 222, Joint App. at 130a, 211a. And, what the Commission actually promised was that race and gender data collected would be significant only for the purpose of the licensees' evaluation of their recruitment practices. In the Commission's words: "the fact that a sizeable number of females or minorities have applied for openings will not necessarily establish the inclusiveness of the station's efforts" and that "even if few females or minorities actually apply for openings," it "may ultimately determine that outreach efforts are reasonably designed to reach the entire community." *R & O* at ¶120, Joint App. at 138a. The Commission explained that an assessment of licensees' recruitment programs:

> [would] be premised on all relevant factors ..., not on statistical records alone, [but including] the reach of the recruitment sources utilized ..., whether the broadcaster adequately analyzed the results of its efforts, implemented effective measures to correct any problems, and avoided excessive reliance on word-of-mouth recruitment, ... [but not] the extent to which minorities and women were actually hired or the

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investigate broadcasters' past employment practices. A documented pattern of intentional discrimination would put seriously into question a licensee's character qualifications to remain a licensee. *Id.* at 628-29. While evidence of actual discriminatory conduct in most cases would present substantial and material questions of fact warranting a renewal hearing, evidence of minor statistical disparities between the available minority workforce and a station's minority employment, standing alone, in most cases, would not. *Id.* at 629-30.

> racial, ethnic or gender composition of a station employment workforce.

*R & O* at ¶115, Joint App. at 135a.

The Commission spoke directly on targeted recruitment:

> We believe that the objective of ensuring that minority and female applicants have the opportunity to apply for positions in the broadcast industry may be achieved without a specific requirement that broadcasters in every situation use recruitment methods that specifically target those groups. * * * While targeted sources can enhance the effectiveness of recruitment efforts, stations will be allowed to determine whether, when and how to use them to meet their individual circumstances."

*R & O* at ¶ 77, Joint App. at 110; *see also* ¶ 218, Joint App. at 208a ("we have decided, for policy reasons, not to require broadcasters to use recruitment sources specifically targeting minority and female job applicants").[22]

Not only, therefore, was there no evidence that the feared effects of Option B underlying the lower court's ruling would occur, there was clear evidence that they would not. Moreover, for those licensees unable to trust that the Commission would be bound by its representations, there was Option A, under which no data collection was required. *R & O* at ¶ 224, Joint App. at 212a.

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[22]In fact, in the rulemaking proceeding, UCC and others urged the Commission to require targeted recruitment as it did under the prior rule, but those suggestions were rejected. *See R & O* at ¶¶ 77, 218, Joint App. at 110a, 208a.

The lower court was not free to ignore the Commission's representations as to meaning of the rule. It is a "cardinal principle" of statutory interpretation that a court must give an agency's interpretation of its own regulations "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *see also Robertson v. Methow Valley Citizen Council*, 490 U.S. 332, 359 (1989). So long as there is no basis to suspect that the agency's position represents anything less than its considered opinion, judicial deference is required. *Auer v. Robbins*, 519 U.S. 452, 462-63 (1997).

Deference to the agency should have determined the result here because the Commission's explanations and the text of the rule were entirely consistent. And, since the challenge was brought before seeing how the Commission in fact implemented the rule, the challengers had no basis on which to argue -- and the lower court no basis on which to rule -- that the Commission's true purpose was other than as stated. A facial challenge that the rule is invalid in all its respects, must "stand[] or fall[] on that assertion." *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. at 588 (government's assertion that permit requirement was for environmental regulation and not for land use planning that would be pre-empted, was enough to defeat a facial challenge); *see also Public Lands Council, et. al. v. Babbitt*, 529 U.S. at 751 (2000) (O'Connor, J.)(concurring)(of particular importance was the secretary's assurances).

Even as the lower court crafted a case out of hypotheticals, those used were not the only ones available for analysis. The court supposed that licensees' recruiting resources are fixed and finite, 236 F.3d at 20, Joint App. at 13a, and that to comply with the rule, these limited resources would be

redirected, with the elimination of some of the existing recruitment avenues theretofore relied on by white males.[23] *Id.* Joint App. 13a-14a. There was no citation to any evidence in the record either as to the recruiting budgets of individual licensees or as to industry convention, for this conclusion. It must therefore be accepted that it is just as plausible that licensees do not have fixed recruitment budgets any more than they do for the cost of electricity or attorney's fees, such expenses being determined by events (an unusual number of resignations, an unusually hot summer, an unexpected tort liability) outside the control of the licensee's advanced planning. To comply with the rule, licensees might well spend more to add recruitment sources, attributing the additional expenditure to the cost of regulation. It is also as likely a scenario that the licensee who is more budget-conscious would seek out and employ additional recruitment methods that are available at nominal cost, such as the posting of job vacancies on internet bulletin boards or e-mailing and faxing job announcements to various organizations. In the *R & O*, the Commission expressed approval of these methods of recruitment in fulfillment of the notification requirements of the rule. *R & O* at ¶ 97, Joint App. at 124a.

Thus, in a gross departure from the Court's standards, the lower court's analysis was only about possibilities, about

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[23]The lower court went on to theorize that "[r]ecruiting expenditures are fixed in the short run; even if an employer increases its recruiting budget in response to the Commission's EEO rule, it then must follow the Commission's directive in determining how to allocate those funds." 236 F.3d at 20, n.***. Joint App. at 13a. But, even if it were so that licensees would use newly allocated funds to comply with the rules, such use would have no impact on white males, since with those new funds, the licensees would be adding and not eliminating recruitment measures.

how the Commission might evaluate future circumstances and about what licensees might think and do.

### B. The Lower Court Invalidated the Rule on the Ground that it Might Operate Unconstitutionally in One Hypothetical Circumstance

Even if it were the case that some licensees, misinterpreting the rule, might feel pressured to make specific outreach efforts to persons based on race, it was still error to declare the rule invalid without also considering whether the rule had valid applications. *Salerno*, 481 U.S. at 745; *Rust v. Sullivan*, 500 U.S. at 183. If the lower court had looked for valid applications, it would not have needed to look far. Among other things, the rule required licensees to refrain from discriminatory practices and to engage in self-assessments to avoid the discriminatory effects of facially neutral practices. In speaking on Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, (1994 ed. and Supp.V), the Court explained that that statute aims "not to provide redress but to avoid harm," *Faragher v. Boca Raton*, 524 U.S. 775, 806 (1998), that it is designed to "cause employers...to self-examine and to self-evaluate their employment practices." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). The rule having the same objective of equal employment opportunity also had the same valid applications.

Moreover, since racial data may be used lawfully to show gross statistical disparities, which may constitute prima facie proof of a pattern or practice of discrimination under Title VII, such data is useful to licensees in determining whether their recruitment practices are in accord with law. *See City of Richmond v. J.A. Croson* Co., 488 U.S. 469, 501 (1989)

("There is no doubt that '[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination' under Title VII."); *Hazelwood School District v. United States*, 433 U.S. 299,306 (1977)(same); *see also Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)(Title VII proscribes both overt discrimination as well as "practices that are fair in form, but discriminatory in operation"); *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 650 (1989)(objective or subjective selection practices, while facially neutral, but having an adverse effect on a protected group may be actionable).[24] The Commission's express statutory powers permit it to require licensees to avoid law violations.

There was also the Commission's representation that it would use applicant data for purposes of monitoring and evaluating industry trends, which it is required to do in order meaningfully to regulate wire communications services. *R & O* at ¶¶ 164-65, 225, Joint App. at 169a-170a; 1992 Cable Act, 47 U.S.C. §554(d)(3)(B).[25]

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[24] *See also United States v. Warren*, 138 F.3d 1083 (6th Cir. 1998) (practice of advertising for job vacancies only in the predominantly white county and refusing to advertise in the more racially heterogeneous neighboring city was Title VII violation); *EEOC v. Metal Serv. Co.*, 892 F.2d 341, 350 (3d Cir. 1990)(informal word-of-mouth hiring process, "in conjunction with an all white workforce, is itself strong circumstantial evidence of discrimination"); *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1436 and n.3 (9th Cir.)(use of whites to recruit by word-of-mouth resulting in all white workforce and giving preferences to friends and relatives of existing employees was discriminatory), *modified on other grds*, 742 F.2d 520 (1984); *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 313 (6th Cir. 1975)(reliance on referrals by a predominately white work force was discriminatory).

[25] This section requires the Commission to collect information on "hiring, promotion and recruitment practices necessary for the Commission

Since the rule could be applied in various ways to all licensees without infringing upon constitutionally protected rights, the facial challenge should have failed.

## II. Review is Warranted Because the Lower Court's Failure to Apply the Court's Standards for Avoiding Constitutional Questions Resulted in a Needless Conflict Among the Circuit Courts

It is a deeply-rooted and time-honored rule of construction that a statute must be construed so as to avoid a constitutional question. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575

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to evaluate the efforts of entities to comply with the provisions." 47 U.S.C. §554(d)(3)(B). The Commission has understood this directive to mean that cable operators "are expected to maintain sufficient documentation of their efforts to recruit qualified females and minorities for all vacancies". 8 FCC Rcd at 5395. In fact, as licensees, Broadcasters' constituents have been required by the Commission to maintain data on the racial make-up of their employment forces for three decades. *See R & O* at ¶¶ 164-65, 225, Joint App. at 169-170a, 212a. In *Lutheran Church*, 141 F.3d at 352, while the court objected to the requirement that licensees compare workforce data with the labor force, it did not rule unconstitutional the requirement that licensees collect such data in the first place. Indeed, it is well-established that government collection of data about the racial composition of an industry or the population in general is constitutionally permissible. *See Sussman v. Tanoue*, 39 F. Supp. 2d 13, 25 (D.D.C. 1999)("courts have not found requirements to collect data about the racial and gender make-up of a workforce to violate the Constitution"); *Morales v. Daley*, 116 F. Supp.2d 801 (S.D. Texas 2000)(observing that "*Adarand* [Constructors v. Pena, Inc., 515 U.S. 200 (1995)]... does not deal with government collection of data on race", in holding that census collection of racial data is constitutionally permissible); *cf* Jury Selection and Service Act of 1968, 28 U.S.C. § 1869(h)(requiring federal government to "elicit" the race of all individuals considered for jury duty). And, to the extent that they are employers covered by Title VII, Broadcasters' constituents have been required to collect data on the race and ethnicity of their employees under that statute. 29 C.F.R. §1602.7 (2001).

(1988); *Communications Workers v. Beck*, 487 U.S. 735, 762 (1988). Indeed, "every reasonable construction must be resorted to in order to save the legislation from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657 (1895). In this vein, an alternative interpretation that does not raise a constitutional question need only be "fairly possible". *Crowell v. Benson*, 285 U.S. 22, 62 (1932). "The principle enunciated in *Hooper* ... and subsequent cases, is a 'categorical' one: where such other interpretation exists, the Court's 'plain duty is to adopt that which will save the Act.'" *Rust v. Sullivan*, 500 U.S. at 190; *see also Edmond v. United States*, 520 U.S. 651, 658 (1997)("petitioners are asking us to interpret [the statute] in a manner that would render it clearly unconstitutional -- which we must of course avoid doing if there is another interpretation available"). Application of this canon may require a court to construe a statute narrowly or read into it limitations in order to negate the effect complained of which otherwise would raise a constitutional question. *Jones v. United States*, 529 U.S. 848, 857 (2000); *Edmond v. United States*, 520 U.S. at 658; *Boos v. Barry*, 485 U.S. 312, 330-31 (1988); *United States v. Witkovich*, 353 U.S. 194, 195, 202 (1957).

Accordingly, the lower court was required to find that the rule did *not* pressure licensees to recruit on the basis of race, because that construction was available. It was only by a most strained reading of the rule, ascribing to it proceedings and consequences the Commission had not adopted and had expressly disavowed, and by the indulgence in improbable hypotheticals, that the lower court was able to raise the constitutional question. Rather than read in limits (by accepting the agency's representations as to the effect of the objected to data collection), the lower court read into the rule what it regarded as constitutionally offensive provisions.

Moreover, the views expressed by the Court in *Croson*, 488 U.S. 469, and by other circuit courts on outreach requirements, counseled against adopting a construction calling into question the rule's constitutionality. In *Croson*, the Court rejected the assertion that government measures, merely because they have the object or effect of including minorities in the sharing of government benefits, are constitutionally suspect. Both the plurality and the concurring opinion of Justice Scalia made clear that race-neutral efforts that work to improve the ability of minorities to compete for government benefits, even where there is a corresponding disadvantage to whites, do not establish a constitutionally suspect classification. Writing for the plurality, Justice O'Connor explained in the context of public construction contracting that:

> simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination and neglect.*** [Such changes] would...serve to increase the opportunities available to minority businesses without classifying individuals on the basis of race.

488 U.S. at 509-10. Justice Scalia added:

> A State [may]...for example, ... adopt a preference for small businesses, ... which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have racially disproportionate impact, but they are not based on race. *** Since blacks have been disproportionately disadvantaged by racial discrimination, any race-neutral remedial

> program aimed at the disadvantaged as such will have a disproportionately beneficial impact on blacks.

*Id.* at 526-27. Likewise, broad recruitment likely to increase the number of minorities reached does not offend the Constitution, but works to fulfill its guarantees.

Several other circuit courts have gone further, holding that recruitment and outreach measures having the specific aim of reaching minorities are not constitutionally suspect. In *Raso v. Lago*, 135 F.3d 11, 16-17 (1st Cir. 1998), the court held that a housing program to attract minority- as well as majority-race applicants, which included mailings to minority organizations and assurances of nondiscrimination, did not establish a forbidden racial classification.

In *Duffy v. Wolle*, 123 F.3d 1026 (8th Cir. 1997), the Eighth Circuit held that "[a]n employer's affirmative efforts to recruit minority and female applicants did not constitute discrimination", but only helped to ensure that minorities and women were not discriminatorily excluded. The court pointed out that "[t]he only harm to white males is that they must compete against a larger pool of qualified applicants," which "of course, is not an appropriate objection and does not state a cognizable harm." *Id.* at 1038-39.

On two occasions, the Eleventh Circuit expressed approval of recruitment and outreach initiatives that required more than the rule here. *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1558 (11th Cir. 1994)(providing information and soliciting applications from minorities and women and making presentations at job fairs and college career days to apprise minorities and women of career opportunities, were race-neutral measures); *Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1571 (11th Cir. 1994)(minority recruitment and application fee

waivers were "race-neutral").

In *Billish v. City of Chicago*, 962 F.2d 1269, 1290 (7th Cir. 1992), *vacated on other grounds*, 989 F.2d 890 (7th Cir.)(en banc), *cert. denied*, 510 U.S. 908 (1993), the court upheld "aggressive recruiting" to increase minority representation, as race-neutral.

In *South Suburban Housing Ctr. v. Greater South Suburban Bd. of Realtors*, 935 F.2d 868, 872, 884 (7th Cir. 1991), an "affirmative marketing" plan that required best efforts to attract whites and blacks; the placement of ads in newspapers with a circulation among a targeted race; the distribution of information to selected organizations and employers; and the keeping of records on the race of interested persons, was held not to violate the equal opportunity provisions of the Fair Housing Act.[26]

In sum, there were both authoritative and persuasive bases for an alternative construction of the rule. Yet, contrary to the command to use every reasonable construction to *save* the rule from unconstitutionality, the lower court adopted an unreasonable construction that would *expose* it to questions of constitutionality.

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[26]*See also Allen v. Alabama State Bd. of Educ.*, 164 F.3d 1347, 1352 (11th Cir. 1999), *vacated by consent*, 216 F.3d 1263 (11th Cir. 2000)(strict scrutiny does not apply to efforts to recruit minority teachers when no one is disadvantaged on account of their race); *Hayden v. County of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999)(modification of entrance exam to avoid unfairly excluding minority applicants not subject to strict scrutiny); *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 711 (9th Cir. 1997)(suggesting validity of outreach program merely requiring distribution of ads in such a manner as to assure that all persons, including women-owned and minority-owned firms, had fair opportunity to bid); *Honadle v. Univ. of Vermont*, 56 F. Supp. 2d 419, 429 (D. Vt. 1999) (recruitment program targeting minorities does "not create a racial classification demanding strict scrutiny").

## CONCLUSION

The lower court's ruling leaves the Commission unable to carry out the specific requirements of the governing statute to adopt rules and policies to ensure equal opportunity in the wire communications services. The ruling's effects, however, are not confined to the Commission and those who would be excluded by licensees' discriminatory or insular recruitment practices. As it stands, no other government agency whose rules are subject to review in that circuit will be able to assert authority through the adoption of regulations of general application, where all a challenger need do to defeat the regulations before they are applied is to put forth the hypothetical and remote case of unconstitutionality.

WHEREFORE, based upon the foregoing, petitioner prays that a writ of certiorari be issued for the review and reversal of the lower court decision and for a remand for a consideration of those claims made by petitioner which were dismissed as moot by that court.

Respectfully submitted,

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Dated: October 17, 2001